IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 11, 2008 Session

STATE, EX REL. RALPH B. POTTER, ET AL. V. TRACY T. HARRIS, ET AL.

Appeal from the Chancery Court for Carter County
No. 26257 G. Richard Johnson, Chancellor

No. E2007-00806-COA-R3-CV - FILED AUGUST 4, 2008

Relators submitted a signed referendum petition to repeal the local options sales tax to the county election commission for certification; however, the commission determined that many signatures on the petition were invalid and the petition lacked a sufficient number of valid signatures to meet the required statutory threshold and, therefore, declined to certify the petition. Relators filed a petition for writ of mandamus, and the trial court granted summary judgment in favor of the commission. We affirm the judgment of the trial court upon our determination that the relators failed to establish a genuine issue of material fact as to whether the commission's actions were arbitrary and capricious; as to whether there was an abridgement of the relators' constitutional rights to vote, engage in free political speech, or petition the government for redress of grievances; and as to whether the number of valid petition signatures was sufficient upon the commission's recount/reevaluation of petition signatures after suit was filed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Cause Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. KELLY THOMAS, JR., SP. J., joined.

J. Philip Harber, Clinton, Tennessee, for the appellants, Ralph B. Potter and Sam McKinney.

John D. Schwalb, Knoxville, Tennessee, for the appellees, Tracy T. Harris, in her official capacity as Administrator of Elections for Carter County, Tennessee, and Sidney Davidson, Leonard Lewis, Bud Whitehead, Millard Garland, and Dean Perry, in their official capacities as Commissioners of Election for Carter County, Tennessee.

OPINION

I. Background

In the summer of 2004, Ralph B. Potter and Sam McKinney ("the Relators") circulated a "Petition for Referendum to Repeal the Local Option Sales Tax" ("the Petition") for signature of Carter County voters. Thereafter, from August 13 through September 3, 2004, the Relators submitted the signed Petition in parts to the Carter County Election Commission ("the Commission") for certification to the Carter County Commission for placement of the repeal issue on the ballot for referendum. Pursuant to state statutory law, a prerequisite to certification of the Petition for placement on the ballot was that the Petition contain the valid signatures of 10% of the total number of all registered voters in Carter County at the time of filing. Based upon its determination that a total of 30,150 voters were registered to vote in Carter County as of August 13, 2004, the Commission pronounced that 3,015 valid signatures would be required for certification of the Petition.

Upon receipt of the Petition, the Commission checked each signature for authenticity by comparing it to the purported signatory's signature on his or her voter registration card and also reviewed the Petition to ensure that each signatory was registered to vote in and resided in Carter County and was otherwise qualified to sign the Petition. Although there were 5,365 signatures on the Petition, after reviewing the signatures and accompanying addresses, the Commission adjudged only 2,916 of the signatures to be valid, leaving the Petition 99 signatures short of the 3,015 required for certification. The Commission asserted the following reasons for its rejection of 2,449 of the signatures as legally invalid :

1) 11 signatories were convicted felons and therefore no longer registered voters.

2) 2 signatories resided outside of Tennessee.

3) 10 signatories resided outside of Carter County.

4) 19 signatures had been marked out.

5) 65 signatures were not accompanied by an adequate designation of address.

6) 66 signatures were not verifiable because there was no signature on the signatory's voter registration card as an exemplar for verification.

7) 109 signatories were not identifiable because their signatures and printed names were illegible.

8) 143 signatories signed the Petition more than once.

9) 254 signatories failed to include their street address on the Petition.

10) 301 signatories stated an address on the Petition that did not match the address on their voter registration card.

11) 324 signatures did not match the signature of the purported signatory when compared to the signature on his or her voter registration card.

12) 1,145 signatories were not registered to vote at the time the petition was submitted to the Commission.

Insisting that 650 of the rejected signatures were valid, the Relators demanded that the Commission certify the Petition. When the Commission refused this demand, the Relators filed a petition for writ of mandamus in the Chancery Court for Carter County to compel the Commission[1] to certify the Petition to the County Commission for referendum, alleging that the Commission arbitrarily, capriciously, and illegally rejected valid voter signatures and that its actions constituted a violation of constitutional rights of due process and equal protection guaranteed by the constitutions of the United States and the State of Tennessee. Specifically, the Relators alleged, inter alia, that the Commission failed to qualify valid voters,

> a) "alleged to have invalid addresses who in fact had valid addresses according to their voter registrations."
>
> b) "as having valid addresses whose addresses listed on the Petition were in fact valid according to their voter registrations in that the addresses listed were within the precinct of their voter registrations."
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> c) "who included information on the Petition which exceeded information on their voter registration cards, which information was not in conflict with their voter registrations."
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> d) "as having valid addresses who in fact had valid addresses according to their voter registrations in that they failed to list an apartment number on their number on their Petition."
>
> e) "as having valid addresses who in fact had valid addresses

[1]The petition for writ of mandamus named the following persons as respondents: Tracy T. Harris, in her official capacity as administrator of elections and Sidney Davidson, Leonard Lewis, Bud Whitehead, Millard Garland, and Dean Perry, in their official capacities as commissioners of elections.

according to their voter registrations in that said voters' registrations had no street address."

f) "whose signatures on the Petition appeared 'printed' when it appeared in script on their voter registration, as allowed by law."

g) "whose signatures on their voter registrations were their 'legal' signature while their signatures on their Petition were their 'regular' signatures, as allowed by law," and

h) "whose signatures on their voter registrations were their 'regular' signatures while their signatures on their Petition were their legal signatures, as allowed by law."

Both the Relators and the Commission moved for summary judgment. The trial court granted summary judgment in favor of the Commission, holding that the proper standard for review of the Commission's action in failing to certify the petition was whether the Commission acted arbitrarily and capriciously and that the Commission did not act arbitrarily and capriciously, but rather, in full compliance with state statutory requirements and obligations. The trial court further held that the Relators' constitutional claims were without basis and that the statutes pertinent to the Commission's actions were constitutional. Relators appeal.

II. Issue

We address the following issues:

1) Whether the Relators established a genuine issue of material fact as to whether the Commission's actions in rejecting the Petition were arbitrary and capricious.

2) Whether the Relators established a genuine issue of material fact as to whether the Commission's actions in rejecting the Petition constituted a violation of either the Constitution of the United States or the Tennessee Constitution.

3) Whether summary judgment was precluded by the fact that the Commission's re-examination of Petition signatures after suit was filed revealed that 219 signatures that the Commission had previously rejected were in fact valid.

III. Discussion

A. Standard of Review

Summary judgments enable courts to conclude cases that can and should be resolved on dispositive legal issues. *See* ***Byrd v. Hall***, 847 S.W.2d 208, 210 (Tenn. 1993); ***Airport Props. Ltd.***

v. Gulf Coast Dev., Inc., 900 S.W.2d 695, 697 (Tenn. Ct. App. 1995). They are appropriate only when the facts material to the dispositive legal issues are undisputed. Accordingly, they should not be used to resolve factual disputes or to determine the factual inferences that should be drawn from the evidence when those inferences are in dispute. *See* ***Bellamy v. Federal Express Corp.,*** 749 S.W.2d 31, 33 (Tenn. 1988).

To be entitled to a summary judgment, the moving party must demonstrate that no genuine issues of material fact exist and that he or she is entitled to judgment as a matter of law. *See* Tenn. R. Civ. P. 56.04; ***Byrd,*** 847 S.W.2d at 210; ***Planet Rock, Inc. v. Regis Ins. Co.,*** 6 S.W.3d 484, 490 (Tenn. Ct. App. 1999). A summary judgment should not be granted, however, when a genuine dispute exists with regard to any material fact. ***Seavers v. Methodist Med. Ctr.,*** 9 S.W.3d 86, 97 (Tenn. 1999); ***Hogins v. Ross,*** 988 S.W.2d 685, 689 (Tenn. Ct. App. 1998). Our task on appeal is to review the record to determine whether the requirements for granting summary judgment have been met. *See* ***Hunter v. Brown,*** 955 S.W.2d 49, 50-51 (Tenn. 1997); ***Aghili v. Saadatnejadi,*** 958 S.W.2d 784, 787 (Tenn. Ct. App. 1997). Tennessee Rule of Civil Procedure 56.04 provides that summary judgment is appropriate where: (1) there is no genuine issue with regard to the material facts relevant to the claim or defense contained in the motion, *see* ***Byrd***, 847 S.W.2d at 210; and (2) the moving party is entitled to a judgment as a matter of law on the undisputed facts. *See* ***Anderson v. Standard Register Co.***, 857 S.W.2d 555, 559 (Tenn. 1993). A party seeking a summary judgment must demonstrate the absence of any genuine and material factual issues. ***Byrd***, 847 S.W.2d at 214.

When the party seeking summary judgment makes a properly supported motion, the burden shifts to the non-moving party to set forth specific facts establishing the existence of disputed, material facts which must be resolved by the trier of fact. *See* ***Byrd*** 847 S.W.2d at 215; ***Robinson v. Omer***, 952 S.W.2d 423, 426 (Tenn. 1997). The non-moving party may not simply rest upon the pleadings, but must offer proof by affidavits or other discovery materials (depositions, answers to interrogatories, and admissions on file) provided by Rule 56.06 showing that there is a genuine issue for trial. If the non-moving party does not so respond, then summary judgment, if appropriate, shall be entered against the non-moving party. Tenn. R. Civ. P. 56.06.

Summary judgments do not enjoy a presumption of correctness on appeal. *See* ***Nelson v. Martin,*** 958 S.W.2d 643, 646 (Tenn. 1997); ***City of Tullahoma v. Bedford County,*** 938 S.W.2d 408, 412 (Tenn. 1997). Accordingly, when we review a summary judgment, we view all the evidence in the light most favorable to the non-movant, and we resolve all factual inferences in the non-movant's favor. *See* ***Luther v. Compton,*** 5 S.W.3d 635, 639 (Tenn. 1999); ***Muhlheim v. Knox County Bd. of Educ.,*** 2 S.W.3d 927, 929 (Tenn. 1999). A summary judgment will be upheld only when the undisputed facts reasonably support one conclusion – that the moving party is entitled to a judgment as a matter of law. *See* ***White v. Lawrence,*** 975 S.W.2d 525, 529 (Tenn. 1998); ***McCall v. Wilder,*** 913 S.W.2d 150, 153 (Tenn. 1995).

B. Arbitrary and Capricious

Addressing the issue of whether the Relators established a genuine issue of material fact as to whether the Commission's actions in rejecting Petition signatures were arbitrary and capricious, we begin by considering the Relators' argument that there was no objective standard governing the Commission's actions. We find no merit in this argument.

As we have noted, under Tennessee statutory law, preliminary to the local option sales tax repeal issue being placed on the ballot for referendum, the Relators were required to file an initiating petition containing the valid signatures of 10% of the number of all registered voters in Carter County at the time of filing. This requirement derives from Tenn. Code Ann. § 67-6-709, which provides that "[a]ny . . . resolution of a county . . . may be repealed in the same manner as provided by this part for its adoption," and Tenn. Code Ann. § 67-6-707, which further provides in pertinent part that

> [a] resolution or ordinance levying the tax [or repealing] the tax authorized may be initiated by petition of the voters in the following manner: . . . (2) The petition shall be signed by at least a number of registered voters in the taxing jurisdiction equal to ten percent (10%) of the total number of registered voters in the taxing jurisdiction on the date the petition is filed.

Additionally, Tenn. Code Ann. § 2-5-151(h) provides that "the county election commission shall certify whether or not the completed petition meets all applicable requirements within thirty (30) days of filing of the completed petition." Contrary to the Realtors' argument that there were no objective standards to guide the Commission in determining whether the Petition contained a sufficient number of valid signatures, we note Tenn. Code Ann. § 2-5-151, which governs the requisite contents of such a petition, as follows:

> (e) Upon filing, each completed petition shall contain the following:
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> (1) The full text of the question attached to each petition;
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> (2) The genuine signature and address of registered voters only, pursuant to the requirements of § 2-1-107;
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> (3) The printed name of each signatory; and
>
> (4) The date of signature.

Standards guiding the Commission in adjudging which signatures should be counted valid are stated at Tenn. Code Ann. § 2-1-107, referred to at subsection (2) above, which provides as follows:

> (a) Any person signing a petition required under this title, whether for nomination of a candidate, for a referendum or for any other purpose, shall include the address of such person's residence. The signer of a petition must include the address of such person's residence as shown on such person's voter registration card in order for that person's signature to be counted; provided, that if the address shown on the petition is within the precinct in which the person is registered but is not the address shown on the registration card, the signature shall be valid and shall be counted. In the event that the signer of a petition includes information on a nominating petition that exceeds the information contained on such person's voter registration card, the signature shall be counted if there is no conflict between them. If no street address is shown on the signer's voter registration card, that person's signature and address as shown on such person's voter registration card shall be sufficient. However, a street address shall be sufficient, and no apartment number shall be required.
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> (b) Any person who signed a permanent registration card shall sign any petition signed under this title; provided, that any person who printed such person's name on such person's permanent registration card shall print the name on any petition signed under this title. However, failure to comply with the foregoing shall not operate to disqualify any nominating signature or candidate's signature.
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> (c) A person's regular signature shall be accepted just as such person's legal signature would be accepted. For example, for the purposes of this section "Joe Public" shall be accepted just as "Joseph Q. Public" would be accepted.

The above cited statutory law provided clear and specific standards by which the Commission reached its decision that the Petition did not contain an adequate number of valid signatures to qualify the presented issue for referendum. We find no issue of material fact that the Commission arbitrarily and capriciously failed to observe these standards.

With specific regard to signatures on the Petition that were rejected because they did not match the signer's signature on his or her voter registration card, the Relators argue that the

employees of the Commission who compared such signatures were untrained in handwriting analysis. It follows, the Relators contend, that such employees "applied no accepted standard in 'judging' the signatures, and in fact, they applied no standard of any kind in judging the signatures."

The fallacy of the latter contention, that the Commission employees applied no standard in judging the validity of the signatures, is self evident – the standard employed was whether the signature on the Petition matched the signature of a registered voter as it appeared on his or her voter registration card. And, while we find no cases in Tennessee addressing the acceptability of this standard, we find no reasonable basis for its rejection and observe that it has been upheld in other jurisdictions. In ***Protect Marriage Ill. v. Orr***, No. 06 C 3835, 2006 WL 2224059 (N.D. Ill. 2006), the plaintiffs filed a petition to have an advisory question placed on the ballot in an upcoming election. In fulfilling its duty of determining whether the petition contained the requisite number of valid voter signatures, the state election board sent a report form to local election jurisdictions for use in verifying a random sample of petition signatures with instructions to reject any signature that did not "reasonably compare" with the voter registration card signature. Addressing the questions of whether this standard was arbitrary and capricious, and whether there was a need for a handwriting expert to properly assess the validity of the signatures, the Illinois district court stated as follows:

> The state has an interest in ensuring that signatures of advisory questions are accurate, and it is neither arbitrary nor capricious for the [state election board] to instruct local election jurisdictions to see if the signature "reasonably compares" to a voter's registration record card. . . . [I]t would be extremely burdensome for the state to have to undertake a more thorough review of signatures, possibly hiring handwriting experts, to examine petition signatures and determine their validity.

Orr, 2006 WL 2224059 at *9.

Similarly, in ***Malinou v. Bd. of Elections, et al.,*** 271 A. 2d 798 (R.I. 1970), the Supreme Court of Rhode Island, addressing the reasonableness of a state law requirement that a voter's signature on a petition to qualify a candidate for election match the voter's signature on his or her registration card, stated as follows:

> The canvassers and their assistants, as they seek to meet the deadlines established in the primary law, are under no obligation to become handwriting experts. If the signature does not compare identically with the signature on the registration card, the canvassers need go no further. If the result appears to some to be harsh, the remedy is to be

found in the state house, not the courthouse.

Id. at 805.

Next, we address the Relators' argument that the Commission's actions were arbitrary as a matter of law based upon a so-called "numerical disparity test." In support of this argument, the Relators cite ***Emery v. Robertson County Election Comm'n***, 586 S.W.2d 103 (Tenn. 1979), for the proposition that local election officials do not have unfettered discretion to determine which signatures on a petition will count as valid and that if the local officials reject a significant number of signatures, their actions are arbitrary as a matter of law and invalid. The Relators complain that the Commission claims unfettered discretion to reject petition signatures in the instant matter and contend that, because the Commission rejected almost fifty percent of the signatures on the Petition, its actions should be considered arbitrary as a matter of law and, therefore, they should have been granted summary judgment rather than the Commission. We do not find that this argument has any legal or factual basis.

From the record, it is evident that the Commission does not claim unfettered discretion in determining which signatures will be accepted and which rejected. As we have indicated, the procedure pursuant to which the Commission reviews petition signatures and determines which signatures will be accepted as valid is subject to various statutory restrictions and guidelines, and the record does not show that the Commission failed to observe these restrictions and guidelines, claiming "unfettered discretion." Furthermore, we do not agree that the ***Emery*** opinion stands for the proposition that the rejection of a significant number of signatures on a petition for referendum is arbitrary as a matter of law.

In ***Emery***, a candidate for sheriff and a candidate for county commission contested the validity of Robertson County elections in which they were defeated. The plaintiff sheriff candidate's opponent had been elected by a margin of 82 votes, and the plaintiff commissioner candidate had received 341 votes while his two winning opponents had respectively received 453 and 342 votes. The trial court voided 68 votes, found that 2 eligible voters were illegally barred from voting and found multiple categories of irregularities, including the allowance of absentee ballots that were admittedly void and the allowance of votes by persons who had not met residency requirements. However, because there was inadequate proof that the irregularities affected the outcome of the election or influenced any votes, the trial court concluded that the election process was not violated and, therefore, declined to cast out any ballots. The trial court further ruled that, absent fraud, an election cannot not be voided when the number of void votes does not mathematically affect the final outcome. Upon its determination that the 68 void votes and the 2 illegally barred votes did not affect the outcome of the elections in question, the trial court dismissed the plaintiffs' suit. Subsequently, however, the trial court ordered a recount of the ballots cast in favor of the plaintiff commissioner candidate and his opponent who had prevailed by a 1 vote margin and when such recount proved impossible, the trial court voided the election as to these two candidates, based upon its finding of

"a multiplicity of mistakes and/or irregularities and the magnitude of these" and directed that the two candidates' names be placed on the ballot for a new election. ***Id.*** at 106.

In reaching its decision in ***Emery,*** the Supreme Court noted that an election may be voided "upon a sufficient quantum of proof that fraud or illegality so permeated the conduct of the election as to render it incurably uncertain, even though it cannot be shown to a mathematical certainty that the result might have been different." ***Id.*** at 109. The Court further noted that although there was no proof of actual fraud in the case, there was proof of violation of procedural safeguards provided by relevant statutory law, specifically absentee voting statutes, that such violation "affects the freedom and purity of the ballot to exactly the same extent as a ballot tainted with actual fraud" and that "whether there is proof of actual fraud only, or violations of statutory safeguards only, or a combination of the two, the issue is whether or not those acts, viewed cumulatively, compel the conclusion that the election did not express the free and fair will of the qualified voters." ***Id.*** at 109 (citations omitted). The Court went on to find that the trial court was inconsistent in holding that the irregularities it found voided only the election involving the plaintiff commissioner candidate and ruled that the nature of such irregularities made it impossible to say that there was not a consequent effect on the vote received by either the third candidate in the election for commissioner or the vote for the two candidates for sheriff. Accordingly, the Court decreed that the elections were void as to all of these candidates. We find nothing in ***Emery*** which supports the proposition asserted by the Relators that "if the Local Officials reject a significant number of signatures, the action is considered arbitrary as a matter of law."

In sum, we find no merit in the Relators' argument that they presented evidence establishing a genuine issue of material fact as to whether the actions of the Commission in rejecting the Petition were arbitrary and capricious.

C. Constitutional Violations

The Relators also argue that the Commission's rejection of Petition signatures violated both the Tennessee Constitution and the Constitution of the United States. More precisely, the Relators contend that: 1) the Commission violated the Fourteenth Amendment of the United States Constitution and Article I, § 8 of the Tennessee Constitution by failing to accord persons whose signatures were rejected notice and a hearing, thereby denying the signers' rights of due process; 2) the Commission violated the Fourteenth Amendment of the United States Constitution by failing to implement specific and non-arbitrary standards in reviewing the Petition signatures and by rejecting the signatures of persons whose addresses on the Petition did not match the address on their voter registration card, thereby denying the signers' rights of equal protection; and 3) the Commission violated the First Amendment of the United States Constitution and Article I, § 23 of the Tennessee Constitution by rejecting signatures based upon signers' addresses or because signers were not registered to vote at the time they signed the Petition, thereby denying the signers' right of free political speech and their right to petition the government for redress of grievances.

All of the Relators' allegations of constitutional violations are based upon their conclusion that the right to petition for referendum is no different than the right to vote, freely engage in political speech, or petition the government for redress of grievances and, therefore, subject to the same constitutional protections. The Relators cite no authority that supports this conclusion nor does our independent research reveal any such authority.

With respect to the Relators' contention that the right to initiate a petition for referendum is tantamount to the fundamental constitutional right to vote, we note that, although the Tennessee judiciary has not heretofore addressed this issue, other jurisdictions have determined that the right to petition for referendum, unlike the right to vote, is not constitutionally compelled. In this regard, we note the Georgia district court case, ***Kelly v. Macon-Bibb County Bd.***, 608 F. Supp. 1036 (M.D. Ga. 1985), wherein plaintiff county residents argued that the county board of elections' construction of a statute allowing a county to remove itself from state fluoridation requirements by local referendum deprived persons of the right to vote and that absent proof of a compelling state interest, such construction was a violation of the equal protection clause of the Fourteenth Amendment. The court disagreed, finding that the case was not a "right to vote" case and that "referendums, unlike general elections for a representative form of government, are not constitutionally compelled." ***Id.*** at 1039. The court further stated as follows:

> The right to vote in a general election, *i.e.*, the right to participate in *representative* government, is a fundamental constitutional right that may not be abridged absent a compelling state interest. A referendum, however, is a form of direct democracy. Our constitution insures a representative form of government, not a direct democracy. . . . Where a statute provides for an expression of direct democracy, such as by initiative or referendum, it does so as a matter of legislative grace; the right to participate in such a process is not fundamental to our Constitution.

Id. at 1038 n. 1 (emphasis in original)(citations omitted).

Additional authority belying the Relators' contention that the right to petition for referendum is no different from the right to vote is found in ***Bowers v. Polk County Bd. of Supervisors***, 638 N.W.2d 682 (Iowa 2002). In ***Bowers***, plaintiff voter argued that various constitutional rights had been denied by a local board in its rejection of a petition for referendum. Citing ***Kelly***, *supra*, the Iowa Supreme Court ruled that the petition process did not prohibit the plaintiff's exercise of his right to vote. Further finding that the referendum petition process did not interfere with the plaintiff's right to freely engage in political speech, the Court stated as follows:

> Nor does the petition process deny [plaintiff's] protected interest in

> political speech, as he argues. The petition process simply provides a mechanical procedure to obtain signatures for referendum purposes. In providing that procedure, the petition process does nothing more than impose nondiscriminatory, content-neutral restrictions on [plaintiff's] ability to use the referendum procedure. The process in no way restricts his ability to communicate with other voters about proposed legislation.

Bowers, 638 N.W.2d at 692.

Guided by the reasoning of these courts, we do not agree that the right to petition for a referendum implicates the constitutional rights to vote or to freely engage in political speech. Nor do we agree that the right of a citizen to petition the government for redress of grievances, as provided by the Tennessee Constitution and the U.S. Constitution is implicated in the referendum petition process.

The clause of the Tennessee Constitution cited by the Relators as relevant to this argument provides that

> the citizens have a right, in a peaceable manner, to assemble together for their common good, to instruct their representatives, and to apply to those invested with the powers of government for redress of grievances, or other proper purposes, by address of remonstrance.

Tenn. Const. art. I, § 23. Similarly, the First Amendment of the U.S. Constitution guarantees "the right of the people . . . to petition the government for a redress of grievances." U.S. Const. amend. I.

While some states, *e.g*. Colorado and Arizona, have provided for referendum in their state constitutions, Tennessee has not done so. As we noted in ***Vincent v. State***, No. 01A-01-9510-CH-00482, 1996 WL 187573 at *3 (Tenn. Ct. App. M.S., filed April 19, 1996), "[t]he Constitution of Tennessee conveys to the three designated departments all governmental power of the state. It contains no reservation to the people of the powers of initiative or referendum." And we do not agree that either the cited Petition Clause of the Tennessee Constitution or its federal counterpart pertain to a petition to initiate a referendum. Tennessee courts have recognized that Article I, § 23 of the state constitution serves to protect the citizen's rights "to '*instruct'* representatives [and] to '*apply*' to officials." ***Vincent***, at *2 (emphasis added), and the U.S. Supreme Court has construed the Petition Clause of the federal constitution as a guaranty "that people 'may communicate their will' through direct petitions to the legislature and government officials." ***McDonald v. Smith***, 472

U.S. 479, 482 (1976). That the rights of a citizen to appeal to the government for redress are not the rights at issue in the procedure to initiate a referendum was recognized by the Eleventh Circuit in ***Biddulph v. Mortham***, 89 F.3d 1491 (11th Cir. 1997):

> After all, in the initiative process people do not seek to make wishes known to government representatives but instead to enact change by bypassing their representatives altogether. We are aware of no case that has held that state initiative regulations implicate the "right to petition the government for redress of grievances." Moreover, scholarship on the issue explains that state initiative processes do not involve the sort of petitioning that is guaranteed by the Petition Clause.

Id. at 1497.

In summary, we find no merit in the Relators' argument that the constitutional rights of freedom to vote, freedom to engage in political speech, and freedom to petition the government for redress of grievances were implicated in this case.

D. Recount

Finally, the Relators observe that during discovery, the Commission recounted and reevaluated the Petition and that, thereafter, Tracy T. Harris, Carter County Election Administrator, admitted that 219 signatures the Commission had rejected as invalid in the original count, were, in fact, valid and acceptable. The Relators insist that this fact alone supports reversal "as 219 additional signatures qualifies the matter in the petition for presentation to the voters as a referendum."

While it is true that Ms. Harris did testify in deposition that upon recount, 219 previously rejected signatures were determined to be valid, as a result of the same recount/reevaluation, the Commission also concluded that: 1) the total number of signatures required for certification of the petition was actually 3,098, not 3,015 as originally determined, based upon the Commission's finding that there were actually 827 more registered voters in Carter County at the time of the Petition than initially calculated, and 2) 239 signatures that were accepted as valid in the original count were determined to be invalid. Accordingly, upon recount, the number of valid signatures on the Petition still fell short of the number required by Tenn. Code Ann. § 67-6-707, and the Relators' argument to the contrary is without merit.

IV. Conclusion

For the reasons stated in this opinion, the judgment of the trial court is affirmed in all respects. Costs of appeal are assessed to the appellants, Ralph B. Potter and Sam McKinney.

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SHARON G. LEE, JUDGE